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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1994

ARTHUR CALDERON, Warden of San Quentin Prison and DANIEL E. LUNGREN, Attorney General,

Petitioners,

v.

JATURUN SIRIPONGS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI FROM JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Did the Court of Appeals properly conclude that a habeas petitioner was entitled to an evidentiary hearing on his ineffective assistance of counsel claims where these claims present disputed facts that have never been resolved by any court and, if true, entitle petitioner to relief, and where petitioner has never been afforded the benefit of compulsory process and, consequently, has not had a full and fair opportunity to present relevant facts?

2. Was the Court of Appeals required to defer to the district court's "findings of fact" when those findings either did not require determining historical facts, or were made without affording petitioner a full and fair opportunity to dispute the facts?

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI FROM JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondent Jaturun Siripongs respectfully requests that this Court deny the Petition for Writ of Certiorari (hereafter "Petition") filed by petitioners Arthur Calderon and Daniel Lungren. Despite petitioners' strained conclusions, the circuit court's interpretation and application of the law fully comports with that of this Court and of the other federal circuits. At best, petitioners merely disagree with the circuit court's application of the law to the individual facts of the case and raise no "special and important" issues that merit or require review by this Court. See S. Ct. R. 10.1.

STATEMENT OF THE CASE

The opinion of the circuit court, Siripongs v. Calderon, 35 F.3d 1308 (9th Cir. 1994), accurately presents the procedural history and facts surrounding respondent's trial and post-conviction proceedings. Petitioners' Statement of the Case omits several relevant facts regarding the constitutional claims raised in the habeas petition and the district court's adjudication of those claims. To clarify the record, respondent will briefly summarize those relevant facts.

A. The Relevant Constitutional Claims.

The exhibits filed in support of respondent's habeas petition, request for an evidentiary hearing, and opposition to petitioners' summary judgment motion (hereafter "Opposition") demonstrated that respondent was entitled to relief because his trial counsel rendered constitutionally deficient and prejudicial representation.[1] First, trial counsel rendered constitutionally ineffective assistance by his failure to investigate potential guilt and special circumstances defenses, including the most apparent defense in this case -- that others committed the killings for which respondent stood accused. Second, trial counsel unreasonably failed to investigate and present any mitigating circumstances of respondent's life in Thailand -- where he was raised and spent all but a few months of his life -- including respondent's Thai religious and cultural background. Third, trial counsel inexcusably failed to conduct any investigation into respondent's only prior conviction, a burglary committed in Thailand.[2]

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[1] The allegations in the amended habeas petition regarding the ineffective assistance of counsel claims were supported by twenty-one affidavits from experts and lay witnesses. In addition, respondent filed an extensive discovery motion, requesting permission to obtain critical information to fully develop the facts supporting his claims. By contrast, petitioners filed no affidavits either opposing the factual allegations in the petition or supporting their motion for summary judgment on respondent's ineffective assistance of counsel claims.

[2] Trial counsel's deficient performance stemmed, at least in part, from his unsuccessful campaign for the House of Representatives against petitioner, Daniel E. Lungren. Rather than

1. Ineffective Assistance of Counsel During the Guilt Phase.

The habeas petition alleged, and the declarations filed in support of the Opposition documented, that reasonably competent counsel would have conducted an investigation and presented a defense at trial that respondent's role in the crime was solely that of an accomplice to the robbery. In the Petition, petitioners repeat the evidence which was presented to the jury, but omit any discussion of the evidence that would have led reasonably competent counsel to investigate, develop, and present such a defense at trial. See Siripongs, 35 F.3d at 1312-15.

As discussed in the habeas petition and the supporting declarations, virtually all of the physical evidence in the case indicated that others actually committed the killings. Although respondent was arrested with items linked to the robbery, trial counsel possessed substantial evidence that respondent was merely an accomplice to the robbery and did not have the mental state necessary to convict him of capital murder. Petitioners fail to mention that thirty-one fingerprints were found at the scene of the crime -- some of which were in blood -- but none of which match respondent's or the victim's fingerprints. Hair and blood samples that were inconsistent with respondent's and the victims' hair and blood also were found at the crime scene.[3] Similarly, three sets of unidentified shoeprints were discovered at the crime scene. The

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investigate and prepare for trial, respondent's trial counsel "put in 15-hour days walking precincts, manning a telephone in his Long Beach campaign headquarters and attending as many campaign forums as he [was] invited to." Excerpt of Record (hereafter "ER") 705. Indeed, in the months immediately preceding respondent's trial, trial counsel took a four to five week vacation from the public defender's office during which he focused solely on his campaign for Congress. ER 901.

[3] Petitioners note that "[b]lood analysis revealed that some of the blood stains...were consistent with [respondent's] blood and inconsistent with the blood of the victims," without informing the Court that blood also was found that did not match respondent's or the victims'. Petitioners note that two hair samples found at the scene were consistent with respondent's hair, but again neglect to mention the presence of several other hair samples that did not match respondent's hair.

blood samples taken from respondent's car were found on the rear passenger seat and rear floor mats indicating that at least one, and possibly two other people, were in respondent's car.[4] Although respondent had cuts on his hands that petitioners speculate were caused by his "hand slipping down the blade of a knife" in the process of stabbing one of the victims (Pet. at 7), petitioners neglect to mention that the county coroner testified at trial that these cuts also were consistent with defense wounds that could have been sustained while respondent attempted to prevent the murders. ER 1290-1302.

Trial counsel disregarded this substantial evidence. He failed to conduct *any* forensic testing on the physical evidence, investigate the involvement of other persons in the crimes, or otherwise develop the readily available evidence which established that respondent did not kill or intend to kill anyone. Had he developed such a defense, trial counsel could have presented the jury with a wealth of evidence in support of the defense. Trial counsel's deficient performance needlessly subjected respondent to special circumstance liability -- the worst kind of prejudice.

2. Ineffective Assistance of Counsel at the Penalty Phase.

Both the habeas petition and the Opposition demonstrate that trial counsel was constitutionally ineffective at the penalty phase because he failed to conduct any investigation into respondent's life in Thailand. In their Statement of the Case, petitioners fail to mention a number of facts raised by respondent that preclude summarily adjudicating this claim.

Respondent lived the first twenty-five years of his life in Thailand. Trial counsel, however, inexplicably did not conduct any investigation into respondent's life in Thailand or into

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[4] Although petitioners emphasize that blood was found in respondent's car, they neglect to inform the Court that it was located in the rear as well as in the front of the car.

his Thai religious and cultural background, despite the availability of investigative funds to do so.

Had trial counsel conducted even a rudimentary investigation of respondent's life in Thailand, he would have discovered dozens of witnesses willing to testify on respondent's behalf who could have told the jury of the deplorable conditions that respondent endured while growing up. Abandoned by his mother and father when he was three years old, respondent lived in squalor in a home with no running water or electricity, and where no one bothered to clean him or wash his clothes.[5] When his mother reentered his life several years later, respondent's home life was marred by instability, domestic violence, alcohol abuse, and mental illness. Respondent and his siblings were subjected to and witnessed repeated physical, psychological, and sexual assaults on themselves and on each other. Respondent's mother centered her life around her alcoholism, drinking incessantly, hosting parties around the clock and carrying on affairs with an endless parade of men. Despite the turmoil in his life, respondent remained loyal to and cared for his family.[6] Individuals who knew respondent when he lived in Thailand would have told trial counsel that throughout his life respondent demonstrated an uncommonly unselfish willingness to help others.[7]

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[5] See, e.g., Declaration of Hansa Hobson (ER 572); Declaration of Triya Charn Chaovanit (ER 580).

[6] See, e.g., Declaration of Churd-Chai Sattabut (ER 589); Declaration of Hansa Hobson (ER 574); Declaration of Triya Charn Chaovanit (ER 581); Declaration of Surachai Chamchaowaish (ER 601-602); Declaration of Chairat Siripongs (ER 586); Declaration of Nimnuan Ruengrujira (ER 598-99).

[7] See, e.g., Declaration of Triya Charn Chaovanit (ER 584); Declaration of Chairat Siripongs (ER 587); Declaration of Churd-Chai Sattabut (ER 590); Declaration of Rachanee Dechjui (ER 595-96); Declaration of Suthipong Bhibalkul (ER 593).

If trial counsel had investigated Thai culture, he would have learned that respondent holds complex and fundamental Thai values. These cultural values include the Thai concept of Boon khun, the sense of obligation to others, and the Thai emphasis on the community as opposed to the individual.[8] These values were relevant not only to the fundamental penalty question of whether respondent should live or die, but also to the jury's understanding of respondent's reticence regarding the identities of the true killers. See, e.g., Siripongs, 35 F.3d at 1316 ("evidence of Siripongs' Thai culture, including Thai concepts of remorse and shame, might well have bridged a cultural gap between the jury and the accused").

In addition to ignoring his client's cultural background, trial counsel also unreasonably failed to develop and present readily available expert testimony regarding respondent's mental health during the penalty phase of respondent's trial.[9] Despite the existence of compelling mitigating evidence from both lay witnesses and cultural and psychological experts, trial counsel inexplicably and unreasonably failed to present such evidence at the penalty phase. Had trial counsel developed and presented such a defense, the jury would not have sentenced petitioner to death.[10]

3. Ineffective Assistance of Counsel for Failing to Investigate the Circumstances Surrounding Respondent's Thai Burglary Conviction.

Respondent alleged, and the exhibits document that, although trial counsel knew for over a year prior to trial that the prosecution intended to use a prior Thai conviction against respondent, he unreasonably failed to conduct *any* investigation into the nature and circumstances

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[8] Declaration of Herbert Phillips, Ph.D. (ER 1023-1027).

[9] Declaration of John Watts Podboy, Ph.D. (ER 252).

[10] See, e.g., Declaration of Charles Gessler, J.D. (ER 938-54).

surrounding the offense or the validity of the conviction. Instead, trial counsel relied solely on the misinformation he received about the offense from the prosecution. In doing so, he failed to follow his own belief -- and that of a reasonable defense attorney -- that a defense attorney must fully understand the facts underlying his client's prior convictions.

Had trial counsel investigated the circumstances of the prior conviction, he would have learned that the conviction was for a non-violent burglary and not for robbery, respondent did not bring weapons with him on the night of the offense, and, contrary to the impression the prosecutor made upon trial counsel, the only shooting during the offense occurred when respondent was wounded by a security guard in the course of being apprehended. Moreover, as in this case, respondent had an accomplice who planned the burglary and persuaded respondent to participate.[11]

Trial counsel also made no attempt to investigate the validity and admissibility of the Thai conviction. Respondent alleged in his petition that the conviction was invalid since it was obtained in violation of basic constitutional safeguards. As such, it was inadmissible for any purpose, including impeachment of witnesses testifying in mitigation.[12]

B. The Relevant Procedural History.

In March 1991, respondent moved for discovery and for an evidentiary hearing. Petitioners responded by moving for summary judgment (hereafter "Motion"), based solely on the record that had been created by trial counsel, whom respondent claims was constitutionally ineffective. Notably absent from petitioners' moving papers were any affidavits demonstrating

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[11] Declaration of Churd-Chai Sattabut (ER 590).

[12] See Gideon v. Wainwright, 372 U.S. 335, 344 (1963); Zilka v. Estelle, 529 F.2d 388, 389 (5th Cir.), cert. denied, 429 U.S. 981 (1976).

that there were no triable issues of fact and that petitioners were entitled to judgment as a matter of law. In support of its Opposition, respondent filed declarations and submitted extra record materials that demonstrated disputed material facts concerning respondent's ineffective assistance of counsel claims. Although respondent sought leave to conduct discovery under Rule 6 of Rules Governing Section 2254 Cases, the only compulsory process afforded petitioner by the district court was a single deposition of trial counsel.

The district court granted petitioners' Motion, and denied respondent's motions for discovery and an evidentiary hearing. The Ninth Circuit Court of Appeals reversed in part, remanding respondent's ineffective assistance of counsel claims to the district court for an evidentiary hearing.

REASONS WHY THE PETITION SHOULD BE DENIED

The circuit court did nothing remarkable in this case. It simply applied the law consistent with this Court's principles, including those from Blackledge v. Allison, 431 U.S. 63 (1977), to the facts and the record, and concluded that petitioners were not entitled to summary judgment of respondent's ineffective assistance of counsel claims. This decision is not extraordinary.

The record demonstrates that respondent's claims, if true, entitle him to relief. The record also demonstrates that, other than the single deposition of trial counsel, no state or federal court has ever provided respondent with the benefit of compulsory process to conduct discovery or otherwise fully develop the facts which support respondent's constitutional claims. Petitioners' Motion, thus, was essentially a Rule 12(b)(6) motion for judgment on the pleadings. Such a motion clearly is improper where, as in this case, the ineffective assistance of counsel claims are facially adequate, supported by evidence and raise unresolved facts which, if true, entitle respondent to relief.

Additionally, having never had the benefit of compulsory process, respondent has never had a full and fair opportunity to present all of the facts relevant to his claims. See Blackledge v. Allison, 431 U.S at 83, n. 26 ("without the benefit of compulsory process . . . [i]t can . . . hardly be said that [petitioner] was granted a 'full opportunity for presentation of the relevant facts' or that his petition received 'careful consideration and plenary processing.'") For example, respondent has never been permitted to conduct forensic testing on evidence collected at the crime scene -- including thirty-one fingerprints, some of which are in blood, and numerous blood stains, shoeprints, and hair samples -- that the record establishes is not attributable to respondent. This untested evidence raises unresolved factual questions concerning the constitutional adequacy of trial counsel's failure to consider presenting an accomplice

defense. Similarly, respondent has raised unresolved factual issues concerning the prejudice resulting from trial counsel's failure to investigate available mitigating evidence, such as that presented by the declarations filed in support of the Opposition. Consequently, the circuit court correctly concluded that respondent was entitled to an evidentiary hearing prior to adjudicating his ineffective assistance claims.

Significantly, petitioners have failed to demonstrate that the circuit court's opinion conflicts with the decisions of other circuits or of this Court. Additionally, petitioners' clairvoyant prediction that the circuit court's decision "requires an evidentiary hearing [in] all cases" is preposterous. Pet. at 29. As petitioners themselves recognize, the decision does not change the rules concerning entitlement to an evidentiary hearing; it does nothing more than narrowly apply settled principles to the particular facts of this case:

> There is no new law in Siripongs. The panel decision in Siripongs did not change existing precedent concerning the standard for determining whether an evidentiary hearing is necessary. Respondent submits that Siripongs does not mandate an evidentiary hearing in every case in which petitioner claims ineffective assistance of counsel. Rather, such a proceeding is only necessary when petitioner has raised a "colorable" claim. To establish a colorable claim the entire record must be considered. This was done by the Siripongs court and is in keeping with other decisions of the Ninth Circuit. Respondents' Memorandum of Points and Authorities in Opposition to Petitioner's Motion for Reconsideration by the Magistrate Judge of the Amended Order Filed June 22, 1994, in James Karis v. Arthur Calderon and James Gomez, E.D. CA CIV-S-89-527-LKK/JFM, at 3.

Since both petitioners and respondent agree that the circuit court "did not change existing precedent concerning the standard for determining whether an evidentiary hearing is necessary," petitioners have failed to demonstrate that respondent's case need be reviewed. This Court should not expend its valuable resources by granting certiorari on a petition whose only underpinning is petitioners' dissatisfaction with the circuit court's ruling.

I.

THE COURT OF APPEALS CORRECTLY APPLIED WELL-ESTABLISHED STANDARDS GOVERNING SUMMARY JUDGMENT AND THE GRANTING OF EVIDENTIARY HEARINGS IN HABEAS CASES.

Applying settled law to the unique factual situation before it, the circuit court correctly determined that respondent's claims of ineffective assistance of counsel state a prima facie case for relief and can be resolved only after fair and thorough fact-finding and resolution of factual disputes.

A. The Lower Court's Application of Summary Judgment and Evidentiary Hearings Standards is Entirely Consistent with this Court's Decisions.

In reversing the district court's grant of summary judgment, the circuit court followed settled legal standards governing summary judgment and evidentiary hearing motions. The circuit court articulated the standard as follows:

> A petitioner in a capital case is entitled to an evidentiary hearing where there has been no state court evidentiary hearing and the petitioner raises a "colorable" claim of ineffective assistance. Smith v. McCormick, 914 F.2d 1153, 1170 (9th Cir. 1990); Hendricks v. Vasquez, 974 F.2d 1099, 1103, 1109-10 (9th Cir. 1992). See also Morris v. California, 966 F.2d 448, 454 (9th Cir. 1991) (non-capital case; remand for evidentiary hearing required where allegations in petitioner's affidavit raise inference of deficient performance), cert. denied, ___ U.S. ___, 113 S.Ct. 96, 121 L.Ed. 57 (1992).

Siripongs, 35 F.3d at 1314. The circuit court expressly recognized that the right to an evidentiary hearing is premised upon a sufficient showing of constitutional entitlement to relief. In addition to citing to cases in which habeas petitioners were entitled to hearings in federal court because they had raised colorable claims of ineffective assistance and had not received evidentiary hearings in state court, the circuit court cited Shah v. United States, 878 F.2d 1156, 1159-60 (9th Cir.), cert. denied, 493 U.S. 869 (1989), in which the court held that an

evidentiary hearing is not required when petitioner's allegations are "patently frivolous and totally incredible." Siripongs, 35 F.3d at 1314.

The Ninth Circuit's articulation of these standards fully conforms with this Court's dictates. This Court consistently has held that where there are disputed material facts and the allegations of a habeas petition, if proved, would entitle a petitioner to relief, a federal court "must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court." Townsend v. Sain, 372 U.S. 293, 312 (1963); see also Keeney v. Tamayo-Reyes, 504 U.S. ___, 112 S. Ct. 1715, 1721 (1992). The circuit court's standards are wholly consistent with these standards, as well as the standards articulated by other federal circuits.[13]

The circuit court also correctly recognized that a party is entitled to summary judgment only where the record shows that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. Proc. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-251 (1986). The party moving for summary judgment has the burden of demonstrating the absence of disputed material facts and entitlement

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[13] See, e.g., Nell v. James, 811 F.2d 100, 106 (2d Cir. 1987) ("summary disposition of [petitioner's] claim of ineffective assistance of counsel is inappropriate;" "Because [petitioner's] various allegations present at least a colorable claim and are therefore non-frivolous, we must remand to the district court."); United States v. Dawson, 857 F.2d 923, 928 (3rd Cir. 1988) ("If...a claim, when taken as true and evaluated in light of the existing record, states a colorable claim for relief under Strickland, then further factual development in the form of a hearing is required. That is, if a non-frivolous claim does not conclusively fail either prong of the Strickland test, then a hearing must be held."); Becton v. Barnett, 920 F.2d 1190, 1194 (4th Cir. 1990) ("[Habeas petitioner] has established that counsel's performance may well have fallen below the level of competence, and that he was likely prejudiced by such deficient performance. Therefore, [petitioner] has presented a colorable claim that counsel was ineffective based on the failure to investigate [petitioner's] competence."); Harich v. Wainwright, 813 F.2d 1082, 1090 (11th Cir. 1987) ("In cases where a petitioner raises a colorable claim of ineffective assistance, and where there has not been a state or federal hearing on this claim, we must remand to the district court for an evidentiary hearing."), cert. denied, 489 U.S. 1071 (1989).

to relief as a matter of law. See Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970). Moreover, in ruling on a motion for summary judgment, a district court must examine the evidence before it in the light most favorable to the non-moving party. Id. at 157-59; Anderson, 477 U.S. at 255.

The circuit court correctly applied these settled principles concerning summary judgment and evidentiary hearings to respondent's ineffective assistance of counsel claims. The court recognized the standard enunciated in Strickland v. Washington, 466 U.S. 668 (1984), and correctly interpreted its requirements:

> The ultimate burden which must be borne if [respondent] is to succeed on his ineffective assistance of counsel claim, is to show both that trial counsel's performance was defective and a reasonable probability that, but for the deficient performance, the outcome of the proceeding would have been different.

Siripongs, 35 F.3d at 1313-14.

The court then narrowly applied the Strickland two-prong standard when considering whether respondent's claims were sufficient to warrant an evidentiary hearing. After reviewing over 1300 pages of extensive materials filed in support of respondent's petition, motion for evidentiary hearing, and Opposition, the court determined that respondent had alleged facts that, if true, entitled him to relief on his claims of ineffective assistance of counsel. Siripongs, 35 F.3d at 1316. Accordingly, the court determined that respondent had made a sufficient showing entitling him to a hearing. The circuit court expressly recognized that the issue before it was solely whether respondent's claims entitled him to an evidentiary hearing in federal court, and did not engage in a broader application of the standard or purport to determine the actual merits of respondent's claim. Id. at 1314.

1. The Accomplice Defense.

Petitioners assert that summary judgment was appropriate on the ineffective assistance of counsel during the guilt phase claims because trial counsel's actions were "reasonable" and the product of a "tactical decision." Pet. at 15, 34. The record, however, demonstrates otherwise. Siripongs, 35 F.3d at 1314 ("This record . . . does not contain any evidence from which it can be inferred that trial counsel's decision not to mount a defense at trial was the result of an informed, tactical decision.") The circuit court correctly recognized that "without the benefit of an evidentiary hearing . . . we cannot determine if counsel's decision was a strategic one, and if so, whether the decision was a sufficiently informed one." Id. at 1314-15 (quoting Hendricks v. Vasquez, 974 F.2d 1099, 1109 (9th Cir. 1992)).[14] The court further recognized that the district court's refusal to permit discovery precluded respondent from presenting a fully developed record as to the prejudice resulting from trial counsel's deficient performance. Siripongs, 35 F.3d at 1313 ("The district court granted summary judgment without permitting [respondent] to conduct any forensic testing.")

The court thus correctly concluded that respondent had alleged facts, which, if true, established a prima facie case under Strickland and entitled him to relief. It is reasonably probable that the introduction of this evidence would have raised doubt regarding respondent's guilt or at least have resulted in a sentence less than death.[15]

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[14] As this Court stated in Strickland, "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland, 466 U.S. at 691. Counsel's conduct may be professionally unreasonable where only one line of defense existed and counsel failed to investigate it. Chambers v. Armontrout, 907 F.2d 825, 828-31 (8th Cir.), cert. denied, 498 U.S. 950 (1990); Osborn v. Shillinger, 861 F.2d 612, 627 (10th Cir. 1988); Profitt v. Waldron, 831 F.2d 1245, 1249 (5th Cir. 1987).

[15] See, e.g., Enmund v. Florida, 458 U.S. 782, 794 (1982) (discussing reluctance of juries to impose death sentence for accomplice liability). The plain language of California Penal Code

2. The Penalty Phase Claims.

Petitioners assert that trial counsel's "decision" not to investigate respondent's background was reasonable because of counsel's fear of the introduction of the prior conviction. The Court of Appeals properly concluded that trial counsel could have tailored the presentation of mitigating evidence to avoid any cross-examination about the prior conviction. Siripongs, 35 F.3d at 1316 ("the trial court ruled that so long as the mitigation evidence went to Siripongs' lack of a violent past and did not describe his moral character, the conviction would remain off limits as an impeachment device."); see also People v. Ramirez, 50 Cal.3d 1158, 1192-93, 791 P.2d 965, 987-88 (1990) (prosecutor cannot go beyond aspects of defendant's background to introduce evidence of misconduct unrelated to mitigating evidence presented on direct examination), cert. denied, 498 U.S. 1110 (1991).

Petitioners also assert that the proffered mitigation was not sufficient to warrant an evidentiary hearing, relying on the district court's passing comment that it was "unmoved" by

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section 190.2(b) informed trial counsel that had he presented an accomplice defense to the jury during the guilt phase of trial, the prosecution would have had to prove that respondent intended to kill before the jury could find the felony-murder and multiple murder special circumstances true. People v. Anderson, 43 Cal.3d 1104, 1138-50, 742 P.2d 1306, 1325-33 (1987) (overruling Carlos v. Superior Court, 35 Cal. 3d 131, 672 P.2d 862 (1983) and People v. Turner, 37 Cal. 3d 302, 690 P.2d 669 (1984)); see also People v. Warren, 45 Cal.3d 471, 486-88, 754 P.2d 218, 227-229 (1988). In Anderson, the California Supreme Court held with regard to felony-murder special circumstances and multiple murder special circumstances, that where a defendant is an accomplice, as opposed to the actual killer, intent to kill must be proved before either alleged special circumstance can be found true. Anderson, 742 P.2d at 1331, 1333.

The California Supreme Court subsequently held that Anderson is applicable to crimes committed before Anderson and prior to the court's overruled decision in Carlos. People v. Hamilton, 46 Cal.3d 123, 144-45, 756 P.2d 1348, 1359 (1988), cert. denied, 489 U.S. 1040 (1989). The crimes for which respondent has been convicted and sentenced to death were committed in 1982, one year prior to the California Supreme Court's decision in Carlos. Therefore, Anderson controls and requires proof of intent to kill before special circumstance allegations as to an accomplice can be found true.

the numerous declarations and exhibits proffered by respondent. The circuit court properly concluded otherwise. After carefully evaluating the trial record and respondent's allegations and exhibits, the court concluded that "[t]he mitigating evidence counsel chose not to introduce, based on his client's history, would undoubtedly have improved Siripongs' chances of receiving a life sentence rather than the death penalty." Siripongs, 35 F.3d at 1316 (citing Mak v. Blodgett, 970 F.2d 614 (9th Cir. 1992), cert. denied, ___ U.S. ___, 113 S. Ct. 1363 (1993)).[16]

B. The Court of Appeals' Decision Fully Comports with *Blackledge v. Allison*.

Petitioners rely on Blackledge v. Allison, 431 U.S. 63 (1977), to argue that summary judgment was appropriate in this case. The circuit court's decision, however, is completely consistent with Blackledge. In Blackledge, the district court summarily dismissed a habeas petition challenging the validity of a guilty plea. 431 U.S. at 70. This Court held that summary dismissal was improper, concluding that "[t]he critical question is whether [petitioner's] allegations, when viewed against the record of the plea hearing, were so 'palpably incredible,' so 'patently frivolous or false' as to warrant summary dismissal." Id. at 76 (citations omitted). Finding that petitioner's allegations were not vague or conclusory, "palpably incredible" or "patently frivolous or false," this Court concluded that the district court improperly dismissed the petition. Id.

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[16] In an effort to influence improperly this Court's consideration of the issues presented in the Petition, petitioners claim the district court authorized over $350,000 to respondent's counsel "to investigate and present his claims." Pet. at 12. Petitioners falsely convey the impression that this entire amount was spent on investigation without any foundation. Respondent cannot rebut petitioner's false inference without referring to the nature of legal services rendered and thereby forfeiting his constitutional rights. Moreover, as petitioners well know, the issues before the circuit court and this Court have nothing to do with the cost of justice. The question before the circuit court was whether respondent's allegations and supporting materials entitled respondent to an evidentiary hearing. Petitioners' reference to this sum is both misleading and irrelevant to this Court's determination of whether to grant certiorari in this case.

The Court then described the mechanisms available to the district court for adjudicating the constitutional claim following remand. The Court recognized that summary judgment may be appropriate in habeas cases when a party has complied with Rule 56 of the Federal Rules of Civil Procedure: "Upon remand [Warden Blackledge] will be free to make [a motion for summary judgment], supporting it with whatever proof he wishes to attach. If he chooses to do so, Allison will then be required either to produce some contrary proof indicating that there is a genuine issue of fact to be resolved by the District Court or to explain his inability to provide such proof." 431 U.S. at 80-81 (citing Fed. R. Civ. Proc. 56(e), (f)).

In this case, petitioners failed to support their summary judgment motion with any "proof," let alone proof that demonstrated that the allegations in respondent's petition were vague and conclusory, "palpably incredible," or "patently frivolous or false." Moreover, contrary to petitioners' unsupported conclusions, the Court of Appeals' decision is fully consistent with other circuits' treatment of the rules set forth in Blackledge. Circuit courts applying Blackledge have concluded that summary dismissal of habeas petitions is appropriate only where there are no disputed facts, or where the allegations made are so conclusory and unsupported, "patently frivolous or false" or "palpably incredible" so as not to merit a hearing.[17] Equally uniformly, circuit courts have found that where the files and records

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[17] See, e.g., Atkins v. Singletary, 965 F.2d 952, 957-58 (11th Cir. 1992); Gaskins v. McKellar, 916 F.2d 941, 946 (4th Cir. 1990), cert. denied, 500 U.S. 961 (1991); Hopkinson v. Shillinger, 866 F.2d 1185, 1211-1212 (10th Cir. 1989), cert. denied, 497 U.S. 1010 (1990); Phillips v. Murphy, 796 F.2d 1303, 1304-05 (10th Cir. 1986); Gipson v. Lockhart, 692 F.2d 66, 68 (8th Cir. 1982); United States v. Cermark, 622 F.2d 1049, 1051 (1st Cir. 1980); Zambito v. Blair, 610 F.2d 1192, 1197-98 (4th Cir. 1979), cert. denied, 445 U.S. 928 (1980); United States v. Dabdoub-Diaz, 599 F.2d 96, 100 (5th Cir. 1979), cert. denied, 444 U.S. 878 (1979); Richardson v. United States, 577 F.2d 447, 450 (8th Cir. 1978), cert. denied, 442 U.S. 910 (1979).

demonstrate the presence of genuine issues of fact, an evidentiary hearing is warranted where, as in this case, no such hearing has been held in a state court.[18]

Most importantly, in this case, the circuit court recognized that summary judgment was particularly inappropriate because the district court deprived respondent of the ability to develop fully the facts supporting his constitutional claims. This conclusion is entirely consistent with Blackledge. In Blackledge, this Court held that the petitioner was "entitled to careful consideration and plenary processing of [his claim,] including full opportunity for presentation of the relevant facts," which opportunity included the "benefit of compulsory process" 431 U.S. at 82-83, n.26.

Respondent has never had the requisite "full opportunity for presentation of the relevant facts." Denying respondent's motion for leave to conduct discovery deprived respondent of access to the compulsory process needed to discover all of the relevant facts.[19] But for the single deposition of respondent's trial counsel, the district court refused respondent's discovery requests. Thus, the circuit court, as have other courts throughout the nation, concluded that it was impossible and unjust to evaluate respondent's ineffective assistance of counsel claims on the basis of a record that had not been developed fully.[20]

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[18] See, e.g., Houston v. Lockhart, 982 F.2d 1246, 1250-53 (8th Cir. 1993); Stano v. Dugger, 901 F.2d 898, 899-905 (11th Cir. 1990); Fitch v. Estelle, 587 F.2d 773, 779 (5th Cir.), cert. denied, 444 U.S. 881 (1979).

[19] Respondent was similarly deprived of the opportunity to develop the record in state court. The California Supreme Court summarily denied respondent's state habeas petition and motion for post judgment discovery without conducting an evidentiary hearing, and subsequently denied respondent's application for investigative funds as moot.

[20] See, e.g., Shaw v. United States, 24 F.3d 1040, 1043 (8th Cir. 1994) (reversing denial of section 2255 petition for evidentiary hearing, holding that district court should have refrained from ruling before the completion of discovery); Hernandez-Hernandez v. United States, 904 F.2d 758, 762 (1st Cir. 1990) (remand for evidentiary hearing on ineffective assistance claims

II.

THE COURT OF APPEALS VIEWED THE DISTRICT COURT'S "FINDINGS" WITH THE PROPER MEASURE OF DEFERENCE.

Petitioners assert that the circuit court did not pay proper deference to the district court's findings of fact. In so arguing, petitioners have mischaracterized the district court's opinion and the circuit court's treatment of that opinion. Where the district court actually made factual findings, the Court of Appeals viewed them with the required deference. The circuit court correctly did not defer to the district court's conclusions of law or to factual findings made by the district court's improper resolution of disputed material facts. See Fed. R. Civ. P. 52(a) ("Findings of fact . . . shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."); United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948) ("A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire

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because issues raised were not "conclusively determined either by the motion itself or by the 'files and records' in the trial court.") (quoting Machibroda v. United States, 368 U.S. 487, 494-95 (1962)); Porcaro v. United States, 784 F.2d 38, 42 (1st Cir. 1986), cert. denied, 479 U.S. 916 (1986) (remand for evidentiary hearing; "At this preliminary pleading stage, we cannot say that no claim of ineffective assistance of counsel was stated with respect to counsel's failure to object to the alleged judicial misconduct, and thus it was error to summarily dismiss this aspect of the § 2255 petition"); Tate v. Wood, 963 F.2d 20, 26 (2d Cir. 1992) (reversing summary denial of habeas petition and remanding for hearing because of uncertainty regarding circumstances of prisoner's claim his counsel was ineffective for failing to investigate self-defense theory); Streetman v. Lynaugh, 812 F.2d 950, 951 (5th Cir. 1987) ("Finding that the facts relevant to [petitioner's] ineffective assistance of counsel claim have not been adequately developed, we reverse and remand for an evidentiary hearing in order to permit the full development of material facts."); Blalock v. Lockhart, 898 F.2d 1367, 1370 (8th Cir. 1990) (finding petitioner was "entitled to have his allegations tested in a federal evidentiary hearing" because there were material facts in dispute regarding his claims of ineffective assistance of counsel, and facts had not been adequately developed in the record since petitioner had not received a full and fair hearing in state court), cert. denied, ___ U.S. ___, 113 S. Ct. 1618 (1993).

record is left with the definite and firm conviction that a mistake has been committed."); see also Anderson v. City of Bessemer, 470 U.S. 564, 573 (1985).[21]

It is well-established that an appellate court reviews both questions of law and mixed questions of law and fact *de novo* and may make an independent determination regarding the questions before it. See, e.g., Miller v. Fenton, 474 U.S. 104, 112 (1985); United States v. McConney, 728 F.2d 1195, 1201, 1204 (9th Cir. 1984) (en banc), cert. denied, 469 U.S. 824 (1984); United States v. Spillone, 879 F.2d 514, 520 (9th Cir. 1989), cert. denied, 498 U.S. 878 (1990). Only when a district court has made purely factual findings must an appellate court defer to the district court's findings. United States Gypsum Co., 333 U.S. at 395.

The circuit court applied these well-established rules in reviewing the district court's opinion. Although petitioners label several statements by the district court as "factual findings," the circuit court correctly concluded that they were mixed law and fact questions or legal conclusions to be reviewed *de novo*. For example, petitioners label as "findings of fact" the district court's statements that respondent's mitigating evidence was "utterly unmoving," the accomplice theory was "absurd," and evidence of the Thai conviction would have been "very damaging." Petitioners are mistaken. These statements relate to whether respondent was

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[21] Although this standard requires deference to a district court's factual findings, that deference is not unlimited. LaRouche v. United States, 779 F.2d 1372, 1374 (8th Cir. 1986). The standard's prohibition of a reviewing court "decid[ing] factual issues de novo," Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123 (1969), in no way diminishes an appellate court's obligation to conduct an independent review of the entire record. See, e.g., Anderson, 470 U.S. at 574; LaRouche, 779 F.2d at 1374. Moreover, the existence of "substantial evidence" to support a court's finding will be overturned on appeal, if the finding is "against the clear weight of the evidence or the appellate court otherwise reaches a definite and firm conviction that a mistake has been made." C. Wright & A. Miller, Federal Practice and Procedure, § 2585, at 735 (1971); see also Williams v. Procunier, 735 F.2d 875, 878 (5th Cir.), cert. denied, 469 U.S. 1075 (1984).

prejudiced by his trial counsel's deficient performance and involve mixed questions of law and fact subject to *de novo* review by an appellate court.

Petitioners similarly are mistaken when they assert that the circuit court failed to accord deference to the district court's conclusion that trial counsel's failure to investigate the accomplice defense was a tactical decision. The circuit court properly determined that the district court erroneously resolved this material fact despite the disputed record before it. Siripongs, 35 F.3d at 1314-15. The only evidence before the district court that could arguably support its conclusion that trial counsel had failed to investigate because of an informed, tactical decision is trial counsel's deposition. Nowhere in this deposition, however, does trial counsel state that his failure to investigate the accomplice defense was the result of a tactical decision. Rather, trial counsel stated that he "got the impression when talking to [respondent] that someone else was involved somehow." ER 901-02. Respondent's counsel did not provide any reasons as to why he did not investigate this impression, nor did counsel provide any reasons for his failure to independently review physical evidence that unquestionably indicated that more than one perpetrator was involved.[22]

Moreover, the circuit court correctly concluded that in instances where the district court did make factual findings, these findings were fundamentally flawed by the district court's refusal to allow respondent access to the necessary tools of discovery that respondent requested. Respondent has never been afforded these crucial tools of discovery at either the federal or the

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[22] "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland, 466 U.S. at 691; see also Kimmelman v. Morrison, 477 U.S. 365, 384 (1986) (adversarial process generally will not function unless defense counsel has done some investigation into various defense strategies). Nothing in the record before the district court establishes that counsel made any such decisions. At a minimum, whether counsel did so is a disputed fact that cannot be properly resolved by a motion for summary judgment.

state level. Therefore, any "factual findings" made by the district court are erroneous in light of respondent's lack of an opportunity to develop his claims.

By remanding respondent's case for an evidentiary hearing to develop the record on the disputed facts at issue, the Ninth Circuit acted wholly in keeping with this Court's well-established precedents. Petitioners fail to establish otherwise and, thus, fail to demonstrate any reason for this Court to review the circuit court's decision in this case.

CONCLUSION

For all of these reasons, petitioners have failed to present any grounds for this Court to review the circuit court's decision. The petition for certiorari to review the judgment of the Court of Appeals should be denied.

Dated: January 11, 1995

Respectfully submitted,

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JATURUN SIRIPONGS

BY: Linda Schilling

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AFFIDAVIT OF SERVICE

I, THE UNDERSIGNED, say: I am a citizen of the United States, am 18 years of age or over, employed in the County of Orange in which County the below stated mailing occurred, and not a party to the subject cause, my business address being 650 Town Center Drive, Twentieth Floor, Costa Mesa, California 92626.

I have served the within **BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI FROM JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT** as follows:

To William K. Suter, Clerk, Supreme Court of the United States, Washington, D.C. 20543, an original and 9 copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing three copies in a separate envelope addressed for and to each addressee named as follows:

Daniel E. Lungren
Attorney General
Laura Whitcomb Halgren
Deputy Attorney General
110 West A Street, #1100
P. O. Box 85266
San Diego, CA 92186-5266

Each envelope was then sealed and with the first-class postage prepaid deposited in the United States mail by me at Costa Mesa, California, on the 11th day of January, 1995.

There is a delivery service by United States mail at each place so addressed or regular communication by United States between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Costa Mesa, California, on January 11, 1995.

Sarah Jones
Sarah Jones

State of California)
County of Orange)

On January 11, 1995 before me, Kathleen L. Linn, Notary Public, personally appeared Sarah Jones, Legal Secretary personally known to me to be the person whose name is subscribed to the within instrument and acknowledged to me that she executed the same in her authorized capacity, and that by her signature on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

Kathleen L. Linn
Notary Public in and for said County and State

AFFIDAVIT OF SERVICE

Attorney:

*Case No:*_____
October Term, 1994

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Petitioners,

v.

JATURUN SIRIPONGS,

Respondent.

I, THE UNDERSIGNED, say: I am a citizen of the United States, am 18 years of age or over, employed in the County of San Diego in which County the below stated mailing occurred, and not a party to the subject cause, my business address being 110 West A Street, Suite 1100; P.O. Box 85266, San Diego, California 92186-5266.

I have served the within PETITION FOR WRIT OF CERTIORARI AND APPENDICES TO PETITION FOR WRIT OF CERTIORARI as follows:

To William K. Suter, Clerk, Supreme Court of the United States, Washington, D.C. 20543, an original and forty (40) copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing three copies in a separate envelope addressed for and to each addressee named as follows:

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Each envelope was then sealed and with the postage prepaid deposited in the United States mail by me at San Diego, California, on the 9th day of November, 1994.

There is a delivery service by United States mail at each place so addressed or regular communication by United States between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, November 9, 1994.

OFFICIAL SEAL
MICHELLE R. RENAUD
NOTARY PUBLIC-CALIFORNIA
COMMISSION # 977280
SAN DIEGO COUNTY
My Commission Exp. November 8, 1996

Lidia Hernández
LIDIA HERNANDEZ

Subscribed and sworn to before me this 9th day of November, 1994.

Michelle R. Renaud
Notary Public in and for said County and State